(S E R V E D)
(DECEMBER 11, 1987)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

December 10, 1987

NO. 86-32

FILING OF AGREEMENT BY PERSONS SUBJECT TO SHIPPING ACT, 1916, AND SHIPPING ACT OF 1984 - EXCULPATORY PROVISIONS IN MARINE TERMINAL AGREEMENTS AND LEASES

PROCEDURAL ORDER

MOTIONS TO DISMISS GRANTED
AND PROCEEDING DISCONTINUED

This case arose as a Petition for Rulemaking Referred to Administrative Law Judge for Hearing. It has to do with the inclusion of exculpatory provisions in marine terminal agreements and leases. In its referral the Commission differentiated this rulemaking from Docket No. 86-15, involving exculpatory clauses in tariffs and stated:

> . . . it appears that some form of evidentiary proceeding is necessary to develop a full factual record upon which a reasoned decision on the Petition can be made. . . .

The Commission then specified that the following issues should be addressed:

(1) whether the practice of including exculpatory liability-shifting provisions in marine terminal leases and agreements is unjust and unreasonable in violation of section 10(d)(1) of the 1984 Act, or section 17 of the 1916 Act;

(2) whether the Commission should by rule prohibit exculpatory liability-shifting provisions in marine terminal agreements and leases; and,

(3) whether the Commission should allow any exceptions to such a prohibition if a prohibition is found to be warranted and necessary.

The Petition for Rulemaking here was filed by the Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA), and they were joined by other parties. The primary opposition to the rule came from various ports and port groups such as the Gulf Port Association, Inc. (GPA), and the California Association of Port Authorities (CAPA). Hearing Counsel was also a party.

The case has proceeded with discovery and prehearing conferences and several procedural orders were promulgated which allowed the parties to submit written testimonial evidence. Subsequently, a series of difficult procedural issues arose, discussion of which is neither germane or necessary to this order. On September 15, 1987, MCSA, the primary proponent of the proposed rule, filed a Notice of Discontinuance, wherein it noted that the proceeding had "become far more complicated, protracted, and expensive than anticipated," and that it had "neither the knowledge, the time, nor the money required to rebut, or even to challenge" presentations made by port interests in New York/New Jersey, the South Atlantic, the Gulf and the Great Lakes. In essence the Notice reflected MCSA's view that it was only

conversant with West Coast ports and the proceeding ought to be limited to those ports. Finally, MCSA stated it "reserves the right to institute complaint proceedings challenging marine terminal and leases which incorporate such provisions (unilateral exculpatory clauses). . . ." (Parenthesis supplied.)

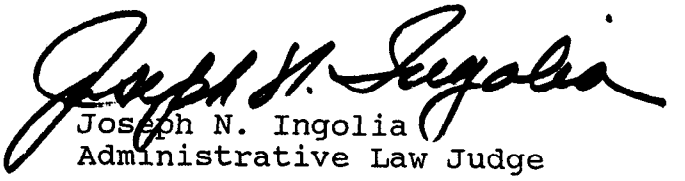
As a result of MCSA's Motion, by Procedural Order served September 23, 1987, all parties were given time to respond in writing to the motion. Those ports opposing the rulemaking filed Motions to Dismiss the proceeding, with which Hearing Counsel agree, with certain reservations. While the exact import of the ports' responses is unclear, it appears they suggest that there should be a finding on the merits on this record that a rule should not issue. It is to this suggestion that Hearing Counsel objects. He notes, "that the record in this proceeding is not an evidentiary record. It is an administrative record, and as such, it is insufficient to provide the infrastructure for any substantive determination."

It is the view of the undersigned that while a voluminous record was made in this case, primarily by the port interests,it does not contain the necessary relevant facts from both adverse interests to warrant any finding that the issuance of a rule is necessary or unnecessary. This is so whether one considers the record as being an "evidentiary" or an "administrative" one. In so holding, however, it should be noted that the ports' submissions do establish that rulemaking in this area, where a contractual provision rather than a unilateral tariff provision is in issue, would be a long-term and difficult undertaking given

the Commission's direction, "to develop a full and factual record," concerning "not only the prevailing market conditions but all relevant facts and circumstances concerning terminal lease and agreement negotiations is essential. . . ." Indeed, it is likely that even when all the facts were martialled, rulemaking might still prove to be inappropriate and one might well conclude that this is the kind of matter that comes within the ambit of the Supreme Court's holding in Securities & Exchange Comm. v. Chenery Corp., 332 U.S. 194, 202 (1947), where it stated:

> . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. See Columbia Broadcasting System v. United States, 316 U.S. 407, 421. (Emphasis supplied.)

Wherefore, in view of the above and the entire record made in this proceeding, the Motions to Dismiss, filed as a result of the Petitioner's Notice of Discontinuance from Further Participation in the Proceeding, are hereby granted to the extent that they request discontinuance of the rulemaking proceeding.



Joseph N. Ingolia
Administrative Law Judge

(S E R V E D)
(JANUARY 15, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-32

FILING OF AGREEMENTS BY PERSONS SUBJECT TO SHIPPING ACT, 1916, AND SHIPPING ACT OF 1984 - EXCULPATORY PROVISIONS IN MARINE TERMINAL AGREEMENTS AND LEASES

NOTICE

Notice is given that the time within which the Commission could determine to review the December 11, 1987, discontinuance of this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

Joseph C. Polking
Secretary